

90-4 49

Supreme Court, U.S.

FILED

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NO.

**In The
Supreme Court of the United States**

OCTOBER TERM, 1990

JAMES HAMILTON,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a forfeiture proceeding, the due process clause of the United States Constitution Amendment 5 requires notice to the possessor of property that his standing is at issue, before property may be forfeited on the grounds that the claimant lacks "standing".

2. Whether the United States Constitution's "standing" requirement is met by proof that one owns the real property, where the seized personal property is found.

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THE WRIT SHOULD BE GRANTED, SINCE THE FIFTH CIRCUIT IGNORED THIS COURT'S PRECEDENTS, INTERPRETING THE DUE PROCESS CLAUSE. DUE PROCESS REQUIRES THAT ONE NOT BE DEPRIVED OF HIS "PROPERTY", ABSENT REASONABLE NOTICE, SO THAT HE MAY HAVE A MEANINGFUL OPPORTUNITY TO BE HEARD 6

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CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment, United States Constitution

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES HAMILTON,

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VERSUS

UNITES STATES OF AMERICA,

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**PETITION FOR WRIT OF CERTIORARI
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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Cir.cuit is unreported. It is attached as an Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 26, 1990. This Court has jurisdiction to review by Writ of Certiorari under USC Sec. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constituional provision involved in United States Constitu-tion Amendment Five, which says:

“No person shall be...deprived of life, liberty or property without due process of law....”

STATEMENT OF THE CASE

On November 30, 1987, the United States filed its complaint alleging that on September 2, 1986, state officials seized \$24,000.00 in cash, marijuana, from the residence of James A. Hamilton. The suit alleges that the currency was taken into custody of the United States on April 6, 1987, and claims the right to forfeiture under 28 USCA Section 881. R., Vol. 1, pp. 1-3.

The United States attached to its Complaint, the "Notice of Claim and Demand", and a cash bond of \$2,400.00 given by James Hamilton on May 22, 1987. R. Vol. 1, pp. 11-14. This "Notice of Claim and Demand" and bond was given pursuant to 21 CFR Section 1316.78, to stop administrative proceedings of forfeiture, and to demand the United States initiate forfeiture proceedings in the United States District Court. This "Notice of Claim and Demand" alleges that the property was seized unlawfully on September 2, 1986, and was unlawfully held without due process hearing by state's agents until April 22, 1987, at which time it was delivered to the United States. R., Vol. 1, pp. 11-12.

On November 30, 1987, the Magistrate directed the "arrest" of the money and service of process upon any person claiming an interest in it. R., Vol. 1, pp. 15. James Hamilton was served with process on December 14, 1987, and on December 29, 1987, Hamilton filed his answer, alleging an illegal search of property not

specified in the warrant, alleging the forfeiture proceeding was untimely, and alleging the money was not the result of any illegal narcotics dealings. R., Vol. 1, pp. 17-24.

With consent of the parties, the Court entered a pretrial Order, with the "pleadings being amended to conform to the Pretrial Order". R., Vol.1, pp. 96-100. The Pretrial Order contains the following contested issues of fact:

"Whether the money is "proceeds" or "exchange" money from or for illegal transactions involving controlled substances."

"A. Is the hearing so untimely as to deny procedural due process; and

B. Was the search in violation of the Fourth Amendment because it was done with a warrant which did not authorize search of the building searched."

R., Vol. 1, pp. 99. There is not a hint in the Pretrial Order that "standing" is an issue in the case.

The case was finally tried on December 8, 1988, shortly more than two years after the money was seized. R., Vol. 2.

The government's witnesses testified that on September 2, 1986, they had seized a large amount of marijuana and the \$24,000.00, from the home of James Hamilton. R., Vol 2, pp 16-77.

Hamilton attacked the government's right to forfeiture, by contending that the search was unlawful, because it was of a building different from the building authorized by the search warrant. R., Vol. 2 pp. 47-48; pp. 74-75. Introduction of this evidence was

was designed to demonstrate to the District Court that the forfeiture was unlawful, since the seizure of the money was made pursuant to an unconstitutional search. Under *Maryland v. Garrison*, 480 US 79, 94 L. Ed. 2d 72, 108 S. Ct. 1013 (1987), officers may not knowingly search a building different from the building specified in the search warrant.

Also, Hamilton introduced evidence of unnecessary delay in carrying out the forfeiture proceeding. R., Vol. 2, pp. 84-85; 87. Unnecessary delay in carrying out a forfeiture is a defense under familiar due process principles. *United States v. 23,407.69 in U.S. Currency*, 715 F. 2d 162 (5th Cir. 1983).

At the close of the trial, it seemed apparent that Hamilton would prevail on both issues. The search was clearly unconstitutional, since no warrant authorized the search of the building that was searched. A huge delay had expired before the initiation of the forfeiture proceeding.

However, The District Court granted the forfeiture, relying on a ground not contained in the Pretrial Order or Pleadings. The District Court ruled that Hamilton had not proved that he had any "standing" to claim the money, since he had not testified that he owned the money. R., Vol. 1, pp. 124-126. On November 5, 1989, three (3) years and one (1) month after the initial seizure, the District Judge ordered the money forfeited to the United States.

On April 26, 1990, the United States Court of Appeals for the Fifth Circuit affirmed, holding that, since Hamilton did not testify at the trial, he had not proved that he had "standing" to contest the forfeit.

ARGUMENT

THE WRIT SHOULD BE GRANTED, SINCE THE FIFTH CIRCUIT IGNORED THIS COURT'S PRECEDENTS, INTERPRETING THE DUE PROCESS CLAUSE. DUE PROCESS REQUIRES THAT ONE NOT BE DEPRIVED OF HIS "PROPERTY", ABSENT REASONABLE NOTICE, SO THAT HE MAY HAVE A MEANINGFUL OPPORTUNITY TO BE HEARD.

To a layman, any finding that Hamilton lacked standing could only be described as bizarre. After all, the United States was bringing this action on the theory that the presence of marijuana in Hamilton's home justified a finding that Hamilton was the owner or possessor of the marijuana. Any person with the slightest notion of common sense would instantly conclude that it was also the Government's theory that the fact that money was also found at the home was sufficient proof that the money was Hamilton's. Could the Government be contending, on the one hand, that the mere fact that the marijuana is found at one's home is proof that the marijuana belongs to him; but the fact that money is also found at the same place is no proof that the money belongs to the same individual? Neither the pleadings nor the Pretrial Order gave any hint that the Government contended any such strange thing. The pleadings alleged jurisdiction of the Court to consider the case, and the Claimant's answer did not dispute this charge. Most significantly, the Pretrial Order specifically stated that the only issues in the case were whether the search was legal, and whether the delay in the forfeiture proceeding violated due process. When the case went to trial, if ever there were a non-issue, it was whether Hamilton had standing.

Yet, seizing an opportunity to punish a drug dealer, irrespective of whatever sacrifice might be made to the Bill of Rights, the District Court endorsed the Government's position, allowing it to snap victory from the jaws of defeat by finding that, after all, Hamilton had never testified the money was his, and thus, lacked standing. The Fifth Circuit affirmed this holding, stating simply that Hamilton "had no standing to contest a forfeiture" and that the Court, therefore, "does not reach the other issues raised by Hamilton."

In holding that the money would be forfeited because Hamilton had not proved standing, when this issue was not raised in the Pretrial Order, the Fifth Circuit acted inconsistently both with its own precedents, and with the precedents of almost every other court of appeals, See *Fowler v. Crown - Zellerbach Corp.*, 163 F. 2d 773 (9th Cir. 1947) (Parties are bound by the issues listed in the Pretrial Order, and trial must be confined to those issues.); *Payne v. S. S. Nobob*, 302 F. 2d 803 (3rd Cir. 1962) (To preserve integrity of pretrial proceedings and to eliminate sporting theory of justice, Pretrial Order fixing the issues for trial must be strictly adhered to.); *Ely v. Reading Co.*, 424 F. 2d 758 (3rd Cir. 1970) (Trial Court properly refused to permit Plaintiff to call an expert witness, to testify to an issue which was not listed in the Pretrial Order.); *Johnson v. United States*, 193 F.2 d 969 (9th Cir. 1951) (Where validity of

rent order was not listed as an issue in pretrial conference, trial court could not consider that issue.); *Randolph County v. Alabama Power Co.*, 784 F. 2d 1067 (11th Cir. 1986) (Trial court properly excluded from trial factual allegations not contained in the Pretrial Order.); *Pierce Co. Hostel Employees and Restaurant Employees Health Trust v. Elks Lodge*, 827 F. 2d 1324 (9th Cir. 1987) (Where defenses of estoppel and lashes were not included in the Pretrial Order, the merits of these defenses could not be considered.); *Alcorn v. Phoenix*, 798 F. 2d 1260 (9th Cir. 1986) (District Court properly refused to consider argument that ordinance was unconstitutionally vague, where this was not listed as an issue in Pretrial Order.); *Glismann v. AT&T Technologies, Inc.* 827 F.2d 262 (8th Cir. 1987) (Trial court properly refused to permit employees in age discrimination case from considering employer's failure to invite them back to work during plant expansion, when this was not listed as issue in Pretrial Order.); *Solinsky v. Arthritis Foundation*, 635 F. Supp. 620 (E. D. NY, 1986) (Claims not listed in Pretrial Order are properly considered to be abandoned.); *Trinity Carton Co. v. Fallstaff Brewing Corp.*, 767 F. 2d 184 (5th Cir. 1985) (It is improper to permit amendment of a Pretrial Order when this amendment seeks to present an issue which was known to the parties at the time of the pretrial conference.)

However, there is the more serious error than ignoring innumerable precedents of the various courts of appeals. A failure to

give one claiming an interest in property notice of the issues is a violation not merely of orderly federal procedure, but of familiar constitutional principles. The United States Constitution Amendment V Due Process Clause requires that one be given reasonable notice of the issues.

In *Mullane v. The Central Hanover Bank and Trust Co.*, 339 U. S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873, (1949):

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated... to afford (a party) an opportunity to present objections.”

Here, because the issue of standing was not raised either in the pleadings or the Pretrial Order, Hamilton was never given notice or an “opportunity to present ‘his’ objections that he had standing. Had Hamilton been alerted, at the trial, that his standing was at an issue, it would have been a simple matter for his attorney to call him as a witness and ask whether or not he had either an equitable or legal interest in the money. Had he been so called, he could have then testified, as his answers to interrogatories stated that he owned one-fifth of the money, and was the bailee for the remainder.

¹ Because the issue of standing was never raised in the Pretrial Order,

¹ One has standing when he has either a legal or an equitable interest. Thus, the bailee of property has standing. *United States v. \$38,000.00 in U. S. Currency*, 816 F. 2d 1538 (11th Cir. 1987).

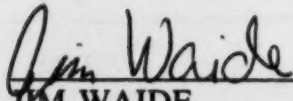
Hamilton did not know it was necessary to present such proof. By deciding the case on an issue of which Hamilton had no notice, the Court violated a fundamental precept of due process — that parties whose rights are affected are entitled to such notice as will permit them to protect their rights. See also, *Memphis Light Gas & Water Division v. Kraft*, 436 U. S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (Due Process was violated as to utility customers when they were given no notice of procedure to contest nonpayment of bills.)

A further reason for the granting of the writ is that the Fifth Circuit's definition of standing is completely at odds with the definition of standing, that this Court has delineated in numerous precedents. The Fifth Circuit ruled that standing may be obtained only if a person, at a forfeiture hearing, actually takes the witness stand, and testifies that he is the owner of the personal property sought to be forfeited. This ruling can not possibly be reconciled with this court's numerous precedents holding that standing requires only proof of a "legitimate expectation of privacy", in the area to be searched. See *Rakas v. Illinois*, 439 U. S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978) (Standing does not depend upon whether one is the owner of the goods seized, but depends upon whether one has a "legitimate expectancy of privacy in the invaded place"; *United States v. Aguirre*, 839 F. 2d 854, 857, (1st Cir. 1988) (Test for

standing is where the individual thought of the place searched as a "private one"; *United States v. Salvucci*, 488 U. S. 83, 65L. Ed. 2d 619, 100 S. Ct. 2547 (1980) (Standing, for constitutional purposes, depends upon whether the individual had a "legitimate expectancy of privacy" in the area searched, and is not dependant upon whether he had an expectation of privacy in the actual personal property which was seized.) Thus, by dismissing Hamilton's claim for lack of standing, the Fifth Circuit ignored both this Court's teachings as to the meaning of procedural due process, and ignored this Court's clear teachings as to the meaning of standing. Such clear disregard for this Court's precedents should be corrected through the granting of the writ.

Respectfully submitted,

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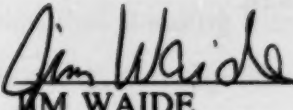

JIM WAIDE
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff, do hereby certify that I have this day mailed, postage-prepaid, three true and correct copies of the above and foregoing to the following:

Honorable Robert Q. Whitwell
P. O. Box 886
Oxford, MS 38655

This the 31st day of August, 1990.


JIM WAIDE

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APPENDIX
IN THE
UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-4769
SUMMARY CALENDAR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

\$24,000.00 IN
UNITED STATES CURRENCY,

Defendant,

AND

JAMES A. HAMILTON

Claimant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
(EC-87-359-B-D)

(April 26, 1990)

Before REAVLEY, KING and JOHNSON, Circuit Judges.

PER CURIAM: ¹

Claimant James A. Hamilton appeals the judgment of the District Court ordering the forfeiture of \$24,000.00 confiscated in a narcotics seizure. We affirm.

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens of the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

In September 1986, state and county police officers executed a search warrant for narcotics that named the residence of James A. Hamilton (Hamilton). Upon execution of the warrant, officers discovered and confiscated a quantity of marijuana, assorted narcotics paraphernalia, triple beam scales and \$24,000.00 in United States Currency. As a result of the seizure, Hamilton was arrested and subsequently convicted in a Mississippi Circuit Court for possession of marijuana with intent to distribute. Hamilton's conviction was affirmed on direct appeal.

At the request of local authorities, the DEA, in an adoptive seizure, took possession of the \$24,000.00. Thereafter, the United States filed a complaint in federal district court seeking judicial forfeiture of the currency. Concluding that Hamilton had not established standing to contest the search, the federal district court ordered the forfeiture of the \$24,000.00. The district court also determined that the Government had established probable cause for a belief that there was a connection between the currency and the narcotics which were seized. Hamilton thereafter filed this timely appeal.

II. DISCUSSION

The \$24,000.00 claimed by Hamilton was forfeited pursuant to 21 U.S.C. § 881 (a) (6) which implicitly provides that only an owner of forfeited property enjoys standing to contest the forfeiture. This Court has held that the question of standing is a threshold one which federal courts must consider even if neither party raises the

issue. See **United States v. One 18th Century Colombian Monstrance**, 797 F.2d 1370, 1374 (5th Cir. 1986). In forfeiture cases such as the one at bar, the claimant bears the burden to "first demonstrate an interest in the [currency] sufficient to satisfy the court of [his or her] standing to contest the forfeiture. **United States v. \$364,960.00**, 661 F.2d 319, 326 (5th Cir. 1981) (citations omitted). The federal district court in this case concluded that Hamilton did not meet that burden. We are constrained to agree.

At the forfeiture proceedings in the federal district court, Hamilton failed to testify and admittedly did not submit any evidence of an ownership interest in the \$24,000.00 at issue. The federal district court, while acknowledging that Hamilton owned the property whence the currency came, nevertheless properly recognized that mere possessory interest in a place is not "tantamount to a sufficient claim of interest in the currency seized therefrom." **United States v. \$15,500.00**, 558 F.2d 1359, 1361 (9th Cir. 1977). Moreover, as the district court noted, even if it could be presumed that Hamilton enjoyed any entitlement to the \$24,000.00, such presumption was overcome by Hamilton's failure to come forth with any evidence to that effect, the Government's evidence that Hamilton was not engaged in any gainful activity that would generate that kind of income, and Hamilton's assertion in a pretrial interrogatory that he only had a one-fifth possessory interest in the currency.

On these facts, we are not persuaded that the district court erred in ordering the \$24,000.00 claimed by Hamilton forfeited. The

burden of establishing standing is placed squarely on the shoulders of the claimant who seeks to defeat the forfeiture. *See United States v. \$321,470.00 in United States Currency*, 874 F.2d 298,302 (5th Cir. 1989). Because Hamilton did not meet that burden, he had no standing to contest the forfeiture. So concluding, we do not reach the other issues raised by Hamilton.

III. CONCLUSION

Hamilton did not establish standing to contest the forfeiture. The district court accordingly did not err in ordering the \$24,000.00 forfeited. The judgment of the district court is affirmed.

AFFIRMED

